

STATE OF MINNESOTA  
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

in the Matter of the Contested	)	
Case of Mr. and Mrs. Myron Agre,	)	
Family-Day-Care Licensees	)	
	)	
VS.	)	REPORT OF HEARING EXAMINER
	)	
Minnesota Department of Public	)	
Welfare.	)	

The above-entitled matter came on for hearing before Allan W. Klein, duly appointed Hearing Examiner in this matter, on January 12, 1977 in Conference Room A, 4-A Hennepin County Government Center, Minneapolis.

Michael Richardson, Assistant Hennepin County Attorney, appeared on behalf of the Department of Public Welfare (hereinafter the "Department"). Kathleen McKown, Legal Aid Society of Minneapolis, appeared on behalf of Sandra and Myron Agre.

Witnesses at the hearing included Mary Timm, Licensing Social Worker, Family Day Care Unit, Hennepin County Welfare Department; Allan L. Wold, Fire Marshall for the City of Minneapolis; Janet Grayson, Orientation and Mobility Specialist, Minneapolis Society for the Blind; Kathleen Saporito, Community/Rehabilitation Teacher, Minneapolis Society for the Blind; Teresa Butler, Sandra and Myron Agre, Delores S. Ryan, and Ethel Schaen.

Notice is hereby given that, pursuant to Minn. Stat. 15.0421 (1975 Supp.), the final decision of the Department in this matter shall not be made until this Report has been available to all parties for at least ten (10) days and an opportunity has been afforded to each party adversely affected to file exceptions to this Report and to present argument to the Department.

Based upon the proceedings herein, the Examiner  
makes the following:

FINDINGS OF FACT

1. That Sandra and Myron Agre have cared for children in their home since 1965, and have been licensed as Family-Day-Care Providers since September of 1970. They were licensed, pursuant to Minn. Rule DPW 2, in September of 1975 to care for four children between infancy and six years of age. That license was due to expire in September of 1976.

2. That on April 15, 1976, Mary Timm orally notified the Agres that she would recommend an immediate change in the restrictions of the license to permit the Agres to care for only two children; one between the ages of three and five, the other six years or older. In addition, she stated that in the event Myron Agre was away from the house at any time child care is being provided, another person be present in the home to assist Sandra Agre. This was confirmed in a letter from Timm to the Agres dated April 29, 1976 (Agency Exhibit No. 3).

3. That Agres requested a hearing on this decision in a letter dated May 5, 1976 (Agency Exhibit No. 4).

4. An Order for Hearing, dated October 5, 1976, was issued by James J. Hiniker, Deputy Commissioner of Public Welfare (Agency Exhibit No. 1) .

5. That both of the Agres are "legally" blind, but that Myron Agre can distinguish objects and children in a room, as well as being able to read labels on canned goods, for example, if they are printed in large print. Sandra Agre's vision is more severely impaired, permitting her to distinguish only between light and darkness (testimony of Myron Agre and Exhibit A to Order for Hearing).

6. That Sandra Agre has an artificial leg due to a bone disease and uses crutches to assist her balance, but that in an emergency, she has carried a child for a distance of five to ten feet without crutches (testimony of Mary Timm and Sandra Agre).

7. That Myron Agre has a mitral valvular heart disease, but that in early 1975, he had an artificial valve implant. In a letter dated March 26, 1976, R. J. Rosenquist, M.D., stated "...I believe his physical condition is somewhat better than it had been for several years prior to his operation." (This letter is attached to the Order for Hearing, Agency Exhibit No. 1). While immediately after his operation he had been limited by his physician to lifting not more than forty pounds, it is unclear whether there are any restrictions on his lifting at present (testimony of Myron Agre).

S. That Mary Timm's recommended reduction was based in part upon Dr. Rosenquist's letter of March 26, 1976, as well as earlier medical informational forms he had supplied to her in 1975. In all three statements, he recommended that the Agres care for one or two children. The recommendations are set forth below:

A. Statement regarding Myron Agre dated 1-2-75:

Has mild hypertension, mitral insufficiency, and frequent [unreadable]. okay for care of 1-2 children,

B. Statement regarding Sandra Agre, dated 1-2-75:

Any questions the above medical conditions raise regarding the above to care for children, should be answered in the light of your experience with her performance in day care in recent years. if they have been successful without problems I could endorse their continuing in day care with small number of children (1-2).

C. Statement regarding Sandra and Myron Agre dated 3- 26- 7 6 :

Mr. Agre has mitral valvular heart disease and had a mitral valve prosthesis put in approximately one year ago. He has done quite well since then, and, in fact, I believe his physical condition is somewhat better than it had been for several years prior to his operation. There are obvious concerns about Mr. and Mrs. Agre providing day care for children due to their blindness and other handicaps. However, their situation is not any different than it had been in prior years when they provided day care, and I do feel that Mr. Agre is perhaps in better health at this time as indicated above.

Mr. and Mrs. Agre have provided day care in the past, and I believe satisfactory past performance must be considered in this regard since there has been no change in Mrs. Agre's health status, and Mr. Agre appears in better health than prior to his operation. If they participate in a day care program, I would



recommend that Mr. Agre have the primary responsibility for child care, and further I would recommend (sic) that they care for no more than one or two children. If previous participation in the licensed family day care program has not been satisfactory, I would interpret this as likely being on the basis of the health problems of either Mr. or Mrs. Agre and would not want to endorse further participation in a family day care program under those circumstances.

9. That the provision of DPW Rule 2 which Mary Timm relied upon is DPW 2 (d) (3) . That rule states:

(3) All adults in the FDC home during the time child care is given shall be reasonably healthy and free from contagious or infectious disease.

Satisfactory Compliance:

The FDC provider shall supply evidence to the Agency that:

(aa) During the six months prior to application, each adult in contact with the FDC children has had a negative Nantoux test or chest X-ray.

(bb) A statement from the provider's physician dated within the six months prior to the application that either:

(i) The provider has received a physical examination and is physically and emotionally able to provide day care to young children.

(ii) or The provider is receiving all necessary continuing medical care and is physically and emotionally able to provide day care to young children.

It is clear that the purpose of this rule (and of DPW 2 in its entirety) is to assure the well-being of the children, not the providers. It is also clear that Dr. Rosenquist's recommendations must be evaluated from the same perspective. To the extent that his recommendations are based upon a concern for the children, they are of vital importance. Conversely, to the extent that his recommendations are based upon a concern for the Agre's well-being, they are irrelevant to this proceeding except as the Agre's health directly impacts upon the well-being

of the children.

While his intent is certainly open to question, it is the decision of the Hearing Examiner for purposes of this Finding that his repeated urgings to use past performance as a guide indicate that he is intentionally avoiding making any pronouncement of what is in the best interests of the children,

and that his recommendation that the Agre's care for no more than one or two children is based upon a concern of what is best for the Agres.

10. That the other reasons given by Mary Timm for here recommendation can be generally characterized as all bearing on the Agres' physical handicaps as they might affect the well-being of the children. They can be categorized, for purposes of discussion into two broad categories: (1) The ability of the Agres to assure the safety of children in emergencies and, (2) the ability of the Agres to assure the safety of children in a normal, day-to-day routine.

With respect to emergencies, Minneapolis Fire Marshall Wold stated that children between the ages of three to six tend to hide from fire and smoke behind doors, in closets, and under beds. Although he had not inspected the Agre's home, nor met them prior to the hearing, he stated that he felt that their blindness was "enough of a handicap" and that Sandra Agre's need for crutches and Myron Agre's heart condition made the situation "worse". His main concern was with the Agres' ability to locate the children.

Mary Timm stated that on a visit to the Agre's, she observed Michelle Pilgrim, a four-year old, walk into the kitchen from the living room. Sandra Agre went into the kitchen and attempted to locate the child. While Sandra Agre was in the kitchen, the child returned to the living room, but Sandra Agre was unaware of her return until Myron Agre told her that the child was back in the living room. Subsequent to that incident, but prior to the hearing, the Agres have installed a gate on the door between the two rooms to keep the children from wandering into the kitchen.

Janet Grayson, who qualified as an expert in orientation and mobility of the blind, stated that the Agres were "perfectly capable" of mobility in their home.

Sandra and Myron Agre both testified about an incident in which they were caring for a two-year old and a four-year old when their house was struck by lightening. The strike caused

a sound "like an explosion" and caused the television to operate although it had been turned off at the time of the strike. Sandra Agre immediately brought the two-year old from a bedroom into the living room, where Myron Agre was caring for the four-year old, and called a neighbor to come to the house and search for fire or any other danger.

Both Agres have memorized the emergency telephone number for their municipality (Bloomington) and are both capable of using the telephone.

Finally, Sandra Agre testified that she would prefer to be caring for infants in an emergency, rather than older children, because she felt the relative immobility of infants made them easier to locate quickly.

Testifying about the second broad category of dangers to children posed by the Agres' disabilities, Mary Timm related an incident which occurred during her inspection visit of October 14, 1976. She stated that a six-month old child was placed on the living room floor and attempted to crawl. The floor had "large patches of dog hair" on it, some of which got onto the child's face and mouth. She stated that Myron Agre, who was in the room with her, asked her whether there was any dog hair on the floor as he had brushed the Agre's collie the night before. This incident led Mary Timm to be concerned about the presence of needles, tacks, or other dangerous articles on the floor which would go undetected because of the Agres' visual handicaps. She stated that she did not see any such objects on the floor.

Timm's visit overlapped with one by Janet Grayson on the same date. Grayson stated that she did not observe any dog hair on the floor. She also testified that she did not observe any needles, tacks, or other stray objects on the floor.

Kathleen Saporito, who qualified as an expert in Vocational Rehabilitation of the Blind, stated that the house was systematically organized and was bare of superfluous objects.

Janet Grayson testified that the blind are taught



various methods to compensate for their handicap. one such method is to immediately retrieve any dropped or misplaced objects. Sandra Agre testified that when she mends or sews, she is sure where all pins or needles are, and that she stored her sewing basket in a manner to make it difficult for children to open. She testified that, in general, she avoids taking more items out of drawers (or other normal storage places) than she absolutely needs at one time in order to avoid forgetting to replace them.

Sandra Agre related that at one time, when the Agres were caring for four and five-year olds, a girl came to their house carrying a purse. Sandra Agre stated that it was their policy to check the contents of purses, and in doing so, matches were discovered in the purse. There was no testimony, however, regarding the checking of pockets.

Both Janet Grayson and Kathleen Saporito were cross-examined regarding the relative abilities of the Agres (as opposed to sighted persons) to locate pins and other small objects on the floor. Both reluctantly agreed that there was a greater danger to children because of the Agres' inability to see such objects.

A second concern raised by Mary Timm regarding day-to-day problems of the Agres arose from her observation of Myron Agre carrying an infant into the living room. She testified that as he entered the living room he "bumped into the wall" but did not injure the child. Later in the hearing, Myron Agre testified about this incident. He stated that he carries infants vertically, with their bodies parallel to his own, rather than the more traditional "diagonal" carrying method. He stated that because of this, his elbows protrude away from the rest of his body, and that it was his elbow which hit the door.

The final concern raised by Mary Timm related to the incident, already discussed, when a child had wandered into the kitchen, and then returned to the living room, leaving Sandra Agre in the kitchen searching for her until Myron Agre

informed his wife that the child had returned to the living room. Teresa Butler, whose infant child, Shawn, has been in the Agre's case since September, 1976, stated that between the two of them, the Agres know where a child is. of all the people who testified in this hearing about their observations of the Agres, the greatest weight is given to the testimony of Butler because she stated that when she come to pick up Shawn, she usually stays at the Agres for approximately one hour, and that Shawn is in their care five days each week. She stated that even when two children were present, the Agres knew the whereabouts of both children.

11. That while it was not clearly stated by Mary Timm, it is believed that one of the bases for her recommendation in favor of older children, as opposed to infants, arises out of the fact that immobile infants would be more difficult to transport, in case of an emergency, particularly in light of Sandra Agre's use of crutches. In response to this concern, Sandra Agre testified about an emergency situation where her mobility was not hampered by her need for crutches. She stated that once a two-year old child was near a window during a severe hailstorm. She was able to carry the child away from the window, a distance of five to ten feet, without her crutches. She also testified about an incident when the parent of a 16-month old girl brought some kernels of corn to be fed to her. Sandra Agre stated that she objected to feeding the corn to the child because she feared the child would not be able to chew it properly, and might choke on it. The parents "insisted" on her using the corn. When it came time to feed the child, she stated that she intentionally did not secure the child in the highchair. The child began "choking hard" on the corn, and she lifted the child out of the highchair, held her upside down, and hit her on the back until the corn was dislodged. She stated that her crutches were no impediment to her in this incident.

Myron Agre testified that he did most of the carrying of children, and Teresa Butler testified that although she had seen Myron Agre carry children frequently, she had never observed Sandra Agre carrying children. Janet Grayson stated she observed them both carrying children.

12. That counsel for the Agres examined several witnesses about the Agres' safety record with children. She asked Mary Timm whether, during the period of licensure, there had been any reports of physical injury or complaints about the Agres. The answer was "No". She asked Teresa Butler whether she believed Shawn was getting safe care. The answer was "Yes, I wouldn't leave him with anybody else". She asked her whether there had been any accidents or injuries. The answer was "No". She asked Sandra Agre whether there had ever been any accident which injured a child. The answer was "No". Myron Agre agreed that there had been no serious injuries, but did recall an incident in which a child had been running on the sidewalk and had tripped on a step and bumped her head.

Appellant's Exhibits A and B are two of a number of questionnaires dated February 10, 1975 which were sent by Mary Timm to parents of children cared for by the Agres. They were the only two which were returned to her. The first question asks:

Considering the nature of Mr. and Mrs. Agre's handicap, were you concerned about the safety of your child/children in the home and Mr. and Mrs. Agre's ability to handle an emergency?

The responses were as follows:

No, I was not concerned. I felt they had complete control.

No, not at all. They are both remarkable people.

The only other question relating to safety was:

Did you feel secure that Mr. and Mrs. Agre could evacuate the child/children satisfactorily in the event of a fire? Please elaborate.

The responses were as follows:

We feel they would have no problem. They know the floor plan of their home, and I would have no fear that they wouldn't be able to get my child out safely.

Yes. Sandy and Myron know their home probably better than I know my own home, and use their sense of smell better than I. I would hope there would never be a fire but should there be one, yes I'm sure they would get out.

13. That Janet Grayson, Sandra Agre and Myron Agre testified that the Agres worked "as a team". All of the witnesses who had personally observed the Agres related incidents where one assisted the other (such as Myron Agre telling Sandra Agre that the child had returned to the living room from the kitchen). However, there are times (approximately once a month for a period of 1 to 1-1/2 hours) when Myron Agre is absent from the home, leaving Sandra Agre to care for the children alone. This led to Mary Timm's recommendation that in the event that he does leave while children are being cared for, that another person be present in the home to assist Sandra Agre.

14. That Minn. Stat. sec. 257.101 (1974) sets forth the basic licensing requirements for family-day-care licensees. Subdivision 2 states, in pertinent part:

Every license shall prescribe the number and age groupings of children who may receive care at any one time.

Minn Rule DPW 2(b)(6) states that the license shall specify the number of children to be cared for.

Minn. Rule DPW 2(c)(2) provides that a FDC (Family Day Care) home shall be licensed for no more than five children under school-age. While it is not precisely defined, "school-age" appears to be six years old [Minn. Rule DPW 2(a)].

That rule goes on to further limit the number of children who can be cared for. DPW 2(c)(2)(aa), as amended in May, 1975, states:

No family day care provider shall care for more than three infants and toddlers under two and one-half years of age at any one time; or more than two infants under fifteen months of age at any one time.

DPW 2(c)(2)(bb) and (cc) provide for exceptions to this limitation.

The terms "infant" and "toddler" are defined in DPW 2(a) to mean six weeks through 15 months; and 16 months through 30 months, respectively.

The Agres' present license is for a maximum of four children, 0 to six years of age.

Putting these all together, the maximum groupings for the Agres under their present license would be:

A maximum of four children under six years old provided that there be no more than three infants and toddlers and of those three, no more than two shall be infants.

In addition to those four, there may be two children over six years of age if the requirements of DPW 2(c)(2)(cc) are met.

Sandra Agre testified that she and her husband had placed self-imposed limits on the number of children that they would care for even though she was unaware (until some recent date) of the limitations of the rule cited above. She stated that those self-imposed limitations were a total of four children, not more than two of whom were "in diapers" (new born to 24 or 30 months of age). She implied that the definition of "in diapers" centered around toilet training.

Both of the Agres testified that infants were easier to handle and carry because of their weight. Sandra Agre also stated that infants were relatively immobile and were also more predictable.

Mary Timm stated that one of the bases for her recommendation prohibiting infants was that the immobility of infants would make them totally reliant upon the Agres in the event

of a fire.

Allan Wold's testimony about children hiding from fire related to children three to six years old.

Janet Greyson stated that infants were relatively less mobile than older children, and Kathleen Saporito stated that she thought it would be more difficult for the Agres to



care for children who were relatively more mobile.

Teresa Butler (whose comparatively greater exposure to the Agres has been noted above) stated that she felt that the Agres were not capable of caring for more than two infants but that they could handle two additional older children who could move about on their own and who would not have to be carried. She went on to state that the presence of these additional older children would not raise any fears regarding the safety of her infant (unless the older children were abusive to the younger ones).

15. That all Findings of Fact herein which should properly be termed Conclusions are hereby adopted as such.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

#### CONCLUSIONS

1. That the Department of Public Welfare gave proper notice of the hearing in this matter; that the Department has authority to take the action proposed; that the Department has fulfilled all relevant substantive and procedural requirements of law or rule.

2. That the burden of proof in the instant case is, pursuant to Minn. Rule HE 217(c)(5), upon the Department.

3. That the Department did demonstrate, by an affirmative presentation of facts, the need for some change in the conditions of the Agres' license. The Department failed, however, to demonstrate by an affirmative presentation of facts, the reasonableness of all of its proposed conditions.

4. That the evidence demonstrated the reasonableness of the proposed condition that there be two persons in the home at all times that child care is being provided.

5. That the evidence did not demonstrate the reasonableness of the proposed limitation of the license to the extent that it would have prohibited the Agres from caring for infants, toddlers or preschoolers under 36 months of age.

6. That there is no evidence to indicate that the



limitations of DPW Rule 2 should not continue to apply to the Agres, or that the limitation of four children, up to six years of age, should not continue to apply.

RECOMMENDATION

That the proposed changes in the licensing of the Agres be affirmed solely on the issue of the presence of two persons being in the home whenever childcare is being provided. That the recommended limitation on the numbers and ages of children be denied, and that the Agres continue to be licensed, but bound by the limitations set forth in their original license (maximum of four children) and DPW Rule 2(c)(2), which would limit them to not more than two infants, etc.  
Dated this 9th day  
of February, 1977.

ALLAN W. KLEIN  
Hearing Examiner

